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Case No. 70422-2-1

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

70422-2-1
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COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON
FILED

HANNAH JONES,

Appellant,

v.

REGENCY PACIFIC, INC.,

Respondent.

BRIEF OF APPELLANT

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Assignments of Error

1. Hannah Jones is entitled to a new trial because the trial court erroneously interpreted the law regarding its statutory duty to ensure a fair and impartial jury.

2. Hannah Jones is entitled to a new trial because the trial court erroneously interpreted the proper legal standard for resolving doubts regarding juror bias against the juror.

3. The trial court abused its discretion by failing to grant Hannah Jones a new trial because of Juror 11's undisclosed actual bias.

4. The trial court abused its discretion by failing to grant Hannah Jones a new trial because Juror 11 intentionally concealed her relationship with defense counsel to increase the likelihood of being seated on the jury and is therefore presumed bias.

5. The trial court abused its discretion by failing to grant Hannah Jones a new trial because of Juror 11's undisclosed implied bias.

6. The trial court abused its discretion by failing to grant Hannah Jones a new trial because the jury engaged in reported but uncorrected misconduct that affected the verdict.

Statement of the Case

A. Procedural History

Appellant, Hannah Jones, brought claims of nursing home negligence and neglect in violation of the Washington Abuse of Vulnerable Adults Statute against the Respondent, Regency Pacific, Inc. (also referred to as "Regency"). Hannah Jones claimed she suffered severe and debilitating injuries because of "negligence" and "neglect" that deprived her of essential care services during her residency at Regency's nursing home. CP 207-224. The case was assigned to Judge Richard D. Eadie for jury trial. The venire was assembled and voir dire was conducted on February 19, 2013, and February 20, 2013. RP 2/19/2013; RP 2/20/2013. By the end of the day on February 20th, a jury with four alternates had been impaneled. By agreement, if more than twelve jurors remained at the end of the trial the alternates would be randomly selected.

The opening statements and the presentation of evidence began on February 21, 2013. The trial lasted four weeks. On the first day of trial, Juror 6 failed to appear and was excused. RP 2/21/2013, 16:16-18:15. On February 28, 2013, the court denied without prejudice Hannah Jones's motion to excuse Juror 11 for undisclosed juror bias. RP 2/28/2013, 3:11-7:21. Throughout the remainder of the trial, Ms. Jones's counsel repeatedly requested that the court excuse Juror 11. CP 359-360, ¶ 9; CP

344, ¶ 4; CP 346, ¶ 2. On March 7, 2013, Juror 2 was questioned by Judge Eadie and then excused because of illness. RP 3/7/2013, 7:4-9:10. After closing statements on March 20, 2013, Hannah Jones's renewed her motion to excuse Juror 11. RP 3/20/2013, 103:25-107:13. The court refused to excuse Juror 11, thus fourteen jurors remained. According to the parties' agreement, Juror 10 and Juror 7 were randomly selected as alternates and excused subject to recall. RP 3/20/2013, 126:11-127:10. The remaining twelve jurors were dismissed to begin deliberations. RP 3/20/2013, 127:7-20. On March 21, 2013, the jury returned a verdict for Regency Pacific, Inc. CP 253-254; RP 3/21/2013, 11:16-12:5.

On April 25, 2013, Hannah Jones filed a Motion for New Trial with supporting declarations complaining of undisclosed juror bias and misconduct. CP 278-292. Regency filed an objection to the declarations filed in support of a new trial, CP 449-456, and a response in opposition to a new trial with their own supporting declarations. CP 461-475. Hannah Jones responded to Regency's objection, 457-460, and replied to Regency's opposition. CP 508-515. A hearing on Plaintiff's Motion for New Trial was conducted on May 17, 2013. CP 340-341; RP 5/17/13. The trial court denied Plaintiff's Motion for New Trial. CP 521-522. On May 24, 2013, Ms. Jones timely filed her Notice of Appeal. CP 524-535.

B. Voir Dire and Evidence of Juror Bias

The following facts and circumstances demonstrate Juror 11's undisclosed bias:

1. On February 19, 2013, the venire was introduced to the lawyers who would be trying the case. RP 2/19/2013, 35:13-36:8. Then the venire was queried on voir dire whether they knew or were familiar with any of the lawyers introduced, including defense counsel, Jennifer Lauren.¹ RP 2/19/2013, 38:12-17. At no time during voir dire did Juror 11 disclose that she knew Ms. Lauren. RP 2/19/2013, 38:16-17; CP 342, ¶ 2; CP 359, ¶ 4.

2. On February 26, 2013, more than a week into the presentation of evidence in the trial, Juror 11 disclosed to the bailiff that she was currently a neighbor of defense counsel, Jennifer Lauren. CP 359, ¶ 7; CP 344, ¶ 2.

3. Within a day of Juror 11's initial disclosure, bailiff, Mary Powell, informed the court that Juror 11 had also reported she knew the name of Ms. Lauren's son. CP 344, ¶ 3; CP 359, ¶ 7.

4. Juror 11 told other members of the jury that she was Ms. Lauren's neighbor. CP 348-349, ¶ 2; CP 488, ¶ 13; CP 492, ¶ 6.

¹ The Judge previously instructed the venire that any question asked during voir dire is "addressed to every juror in the courtroom." RP 2/19/13, 27:12-16.

5. Juror 11 told other jurors that she was "**shocked it had not made a difference to the Court that Ms. Lauren was [her] neighbor.**" CP 488, ¶ 13 (emphasis added). Juror 11 also admitted bias by telling other jurors that she "**should not be on this jury.**" CP 348-349, ¶ 2 (emphasis added).

6. Juror 11's bias was confirmed on March 4, 2013, when she chose to speak to Ms. Lauren in the courthouse hallway during trial, demonstrating that her relationship and comfort level with Ms. Lauren allowed her to disregard the court's instruction not to communicate with the attorneys in the case. RP 3/4/2013, 36:24-37:3; CP 368.

7. During the fifth week of trial, Juror 10, warned the bailiff that "**we were on the verge of a mistrial**" because Juror 11 was openly discussing the case and the lawyers with other jurors before deliberations, despite the court's instruction to the contrary. CP 351-352, ¶ 2 (emphasis added). Notably, the trial court did not inform Ms. Jones's attorneys of Juror 10's report of misconduct.

8. Prior to and during the fifth week of trial, despite the court's instruction not to discuss the case, Juror 11 was openly making biased and prejudicial comments about Hannah Jones's case and her lawyers, who were characterized as "out of staters," "rich lawyers," "a

suing machine,” and other derogatory terms. Juror 11’s comments are another manifestation of her bias. CP 351-352, ¶ 2; CP 349-350, ¶ 4.

9. Prior to and during the fifth week of trial, despite the court’s instruction not to discuss the case, Juror 11 attempted to engage and recruit other jurors to discuss the case before deliberations. CP 351-352, ¶ 2.

10. In response to the information trickling in about her relationship with Juror 11 and the open concern about Juror 11’s bias, on February 28, 2013, Ms. Lauren proposed on the record to make Juror 11 the first alternate; an offer that was later retracted by defense counsel Ms. Andrews. RP 2/28/2013 7:6-9.

11. Most tellingly, Juror 11’s bias for her neighbor, Ms. Lauren, is underscored by her post-verdict actions and statements to Ms. Lauren:

a. After the jury was dismissed on March 21, 2013, Juror 11 asked Ms. Lauren, **“Do you want to ride home together?”** CP 344-345, ¶ 7; CP 346-347, ¶ 6 (emphasis added);

b. After the jury was dismissed on March 21, 2013, Juror 11 remained at the courthouse talking to defense counsel long after the other jurors had left, CP 343, ¶ 4; and

c. After the jury was dismissed on March 21, 2013, Juror 11 was observed leaving the courthouse with defense counsel. CP

343, ¶ 4; CP 347, ¶ 7.

12. What was not disclosed on February 26, 2013, and not disclosed to the court or Ms. Jones's counsel through the remainder of the trial was the following:

- a. Juror 11 has been Ms. Lauren's neighbor for five years, CP 293-294, ¶ 3(a)-(c);
- b. Juror 11's family and the Lauren Family have lived on the same street in homes whose property is only 115 feet apart with only one lot in between, CP 294, ¶ 3(d); CP 354, ¶ 2; and
- c. On March 21, 2013, after the jury returned its verdict, Juror 11 publically stated that **every morning on her way to this trial she would see (Ms. Lauren's son) playing and would waive to him.** CP 345, ¶ 7; CP 346-347, ¶ 5 (emphasis added).

13. Additionally, the probability of routine personal contact between Juror 11 and Ms. Lauren over the past five years, and in the future, was not disclosed to the court or Ms. Jones's attorneys at any time during the trial and was significantly enhanced by reason of:

- a. The closest route of ingress and egress from Juror 11's home, given the street system in their subdivision in Canterbury Woods and the proximity of their homes, requires Juror 11 to drive directly past Ms. Lauren's home, a fact borne out by the above

statement by Juror 11 on March 21, 2013. CP 294-295, ¶ 3(e)-(h);

and

b. Juror 11's and Ms. Lauren's mailboxes are located at the same neighborhood mail drop near the northeast corner of Juror 11's property, thereby increasing the probability of their contact. CP 354-357, ¶¶ 3-5.

14. A further objective impediment to impartiality can be found in the mutual obligations and reciprocally-enforceable agreements existing between Juror 11, Ms. Lauren, and other homeowners of the Canterbury Woods subdivision, which also were not disclosed to the court or Ms. Jones's counsel. Specifically, as homeowners in the platted subdivision of Canterbury Woods Juror 11 and Ms. Lauren were and are not only legally bound by the Protective Covenants of Canterbury Woods for their mutual economic benefit and property interests, but also are co-owners of subdivision common property.¹ These Covenants, which are intended to maintain or enhance the value of the homes in the subdivision, contractually govern the relationship of these neighbors, including how they can use their homes, make improvements to their homes, maintain

² According to a real estate Seller's Disclosure statement dated December 5, 2011, Juror 11 and Ms. Lauren are co-owners and have an undivided interest with other neighbors in common property of the subdivision, to wit: neighborhood signage. CP 396, ¶ 3(l).

common easements, keep up their lawns and landscaping, restrict each other from engaging in noxious or offensive activities, use signs, breed pets or livestock, and even store boats or motor homes. Moreover, it was not known to the court or Ms. Jones's attorneys that pursuant to Section 24 of these Covenants, every owner of a platted lot in Canterbury Woods is entitled to bring a suit to enforce any Covenant term against another neighbor for the violation or threatened violation of any such provision and to collect attorney fees if they prevail. In view of the expansive breadth of these Covenants, it was and will be continually advantageous for these neighbors to support and not antagonize one another in any manner. CP 395-396, ¶ 3(i)-(l).

Argument

Hannah Jones was denied a fair trial because the jury was infected with bias from Juror 11 who confessed she had not disclosed on voir dire that she was a neighbor of one of the defense attorneys and admitted she should not be on the jury. Despite the clear evidence of undisclosed juror bias and misconduct, the trial denied Hannah Jones's Motion for New Trial. However, in ruling, the trial court made the following errors. First, the trial court erroneously interpreted the law pertaining to: (1) its lawful duty to investigate and dismiss unfit jurors, and (2) the correct legal standard for the resolution of doubts regarding juror bias. Second, the trial court erred by not finding that Juror 11's undisclosed bias warranted a challenge for cause. And third, the trial erred by failing to grant Hannah Jones a new trial for juror misconduct.

A trial court's decision to deny a new trial should be overturned when it is predicated on an erroneous interpretation of the law or is a clear abuse of discretion. *State v. Cho*, 108 Wn. App. 315, 320, 30 P.3d 496 (2001).

I. HANNAH JONES IS ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ERRONEOUSLY INTERPRETED THE LAW REGARDING JUROR BIAS.

Hannah Jones is entitled to a new trial because the trial court erroneously interpreted the law regarding: 1) the trial court's statutory

duty to ensure a fair trial, and 2) the standard by which the court should resolve doubts regarding juror bias.

A. The Trial Court Failed to Fulfill its Statutory Duty to Ensure a Fair and Impartial Jury.

The court has a continuous statutory obligation to excuse any juror who is unfit and unable to perform the duties of a juror. *State v. Jordan*, 103 Wn. App. 221, 226, 11 P.3d 866 (2000), *review denied* 143 Wn.2d 1015, 22 P.3d 803. More specifically, RCW 2.36.110 states:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with a proper and efficient jury service.

When juror bias is at issue, "the court has the duty to develop the facts fully enough so that it can make an informed judgment on the question of 'actual' bias." *U.S. v. Nell*, 526 F.2d 1223 (5th Cir. 1976); *see also Hughes v. U.S.*, 258 F.3d 453, 457-58 (6th Cir. 2001).

1. The Trial Court failed to voir dire Juror 11 after she disclosed her current relationship with Ms. Lauren.

The trial court had the duty to inquire into the extent and nature of Juror 11's relationship with Ms. Lauren so that an informed judgment could be made on the question of bias. Contrary to this duty, at no time did the trial court question Juror 11 or permit the parties to conduct voir

dire regarding her previously undisclosed relationship with Ms. Lauren despite the concern repeatedly voiced by Ms. Jones's counsel. CP 359-360, ¶ 9; CP 344, ¶ 4; CP 346, ¶ 2. As such, the court and Ms. Jones were deprived of sufficient facts to make "an informed judgment" as to the nature and extent of Juror 11's bias.

The failure to voir dire Juror 11 was discussed at Ms. Jones's Motion for New Trial, RP 5/17/2013, 38:14-39:8, and Regency argued that Ms. Jones "never requested" the voir dire of Juror 11. RP 5/17/2013, 38:21. However, RCW 2.36.110 clearly places the duty to develop the facts on the "judge"; and, because the court failed to disclose to the parties that one of the jurors had accused Juror 11 of engaging in bias and prejudicial misconduct, Ms. Jones had no way of anticipating the severity of the situation. Nonetheless, the court acknowledged it would be **"a better practice to -- to have voir dire at such a point."** RP 5/17/2013, 41: 9-10 (emphasis added). Despite the acknowledgement of error, the trial court erroneously denied Ms. Jones's Motion for New Trial.

2. The Trial Court also failed to disclose and correct reported juror misconduct.

During the fifth week of trial, Juror 10, warned the Bailiff that **"we were on the verge of a mistrial"** because Juror 11 was openly discussing the case and the lawyers with other jurors before deliberations, despite the

court's instruction to the contrary. CP 351-352, ¶ 2 (emphasis added).

Despite the court's duty to investigate misconduct and excuse unfit jurors, the court did not disclose the report of misconduct to the parties or take any kind of corrective action.

If the report of misconduct had been investigated, the court would have discovered that Juror 11 was openly making biased and prejudicial comments about Hannah Jones's case and her lawyers, CP 351-352, ¶ 2; CP 349-350, ¶ 4; and that Juror 11 was attempting to engage and recruit other jurors to discuss the case before deliberations. CP 351-352, ¶ 2. Without this information, Ms. Jones was incapable of accessing the severity of the situation. More importantly, without this information the court was unable to make an informed judgment on the question of Juror 11's bias; and, the juror misconduct was not only permitted, but passively encouraged.

The trial court's failure to voir dire Juror 11 and its failure to disclose and correct Juror 11's reported misconduct are errors predicated on an erroneous interpretation of the court's lawful duty to investigate and excuse unfit jurors. Therefore, Hannah Jones is entitled to a new trial.

B. The Trial Court Did Not Resolve Doubts Regarding Bias Against the Juror.

When deciding whether to excuse a juror for cause or grant a new

trial in instances of juror bias, whether presumed actual or implied bias, the court must resolve doubts against the juror. *Cho*, 108 Wn. App. 315, 330, 30 P.3d 496 (citing *Burton v. Johnson*, 948 F.2d 1150, 1158 (10th Cir. 1991)). The United States Courts of Appeals for the Fifth and Tenth Circuits have explained this rule stating:

We have no psychic calipers with which to measure the purity of the prospective juror; rather, our mundane experience must guide us to the impartial jury promised by the Sixth Amendment. Doubts about the existence of actual bias should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid.

Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991) (quoting *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976)). Resolving doubts regarding bias against the juror is even more important when considered in context with a trial court's discretion to hear and resolve misconduct in a way that avoids tainting the juror and creating prejudice against either party. See *State v. Jordon*, 103 Wn. App. 221, 229, 11P.3d 866 (2000). As such, it is even more important for the court to resolve doubts regarding bias against the juror in cases like this one where the trial court failed to voir dire the bias juror and fully develop the facts.

In this case, the only clear finding of fact that was made in regards to Juror 11's bias was that her failure to disclose her relationship with Ms. Lauren was "not intentional." RP 5/17/2013, 40:9-14. However, this

finding is contrary to a proper evaluation of the facts and circumstances presented to and observed by the trial court, and resulted in the application of an erroneous legal standard for undisclosed juror bias.

1. Juror 11's Declaration is False.

In opposition to Ms. Jones's Motion for New Trial, Regency procured and filed a sworn declaration from Juror 11, which implies that her failure to disclose her relationship with Ms. Lauren on voir dire was unintentional. However, it appears that Juror 11's declaration was artfully drafted to conceal facts suggesting that her failure to disclose her relationship with Ms. Lauren was, in fact, intentional.

To explain, Juror 11 begins by stating that when she participated in jury selection she did not know or recognize any of the parties or their counsel. CP 487, ¶ 10. This statement obviously describes Juror 11's recollection of the very beginning of voir dire because the parties and their lawyers were introduced to the venire early on the first day. RP 2/19/2013, 35:8-36:8. Clearly, once the lawyers had been introduced to the venire, Juror 11 would know and recognize them, which would make this statement untrue if it were to be applied to any time after the lawyers were introduced. Then, Juror 11 goes on to state:

During the second week of trial, Ms. Andrews verbally referred to her co-counsel as "**Ms. Lauren.**" A light bulb went off in my head, and that was the first time I connected

the name Jennifer Lauren as that of my neighbor.

CP 487, ¶ 11 (emphasis added). The record, which was continuously recorded when the jury was present, does not support this statement. Rather, the record suggests that Juror 11 recognized Ms. Lauren during voir dire and intentionally did not disclose it.

Contrary to the statement in Juror 11's declaration, the record demonstrates that the only times Ms. Andrews referred to her co-counsel as "Ms. Lauren" prior to Juror 11's confession to the bailiff of her relationship to Ms. Lauren was during voir dire. Ms. Lauren was introduced to the venire twice on the first day of voir dire, RP 2/19/2013, 36:1-4; RP 2/19/2013, 79:4, and on the second day of voir dire, Ms. Andrews referred to "Ms. Lauren" when responding to a question from the court. RP 2/20/2013, 42:7. The record is void of any other instance of Ms. Andrew's verbally referring to her co-counsel as "Ms. Lauren" until after February 26, 2013, when Juror 11 told the bailiff that she was Ms. Lauren's neighbor. CP 359, ¶ 7; CP 344, ¶ 2.

This factual discrepancy not only calls into question Juror 11's credibility, but it also suggests that Juror 11 recognized Ms. Lauren during voir dire and intentionally concealed that fact. If the court would have used the correct standard and resolved this doubt regarding bias against Juror 11, it would have found that Juror 11 intentionally concealed her

relationship with Ms. Lauren in order to be seated on the jury and her bias would be presumed. *Cho*, 108 Wn. App. 315, 325, 30 P.3d 496. And that presumption of bias would not be changed by any later protestations of impartiality, however sincere. *Cho*, 108 Wn. App. 315, 329, 30 P.3d 496. Therefore, the court's clearly erroneous finding of an unintentional nondisclosure demonstrates the trial court's misapplication of the standard requiring doubts regarding bias to be resolved against the juror, and Ms. Jones is entitled to a new trial.

2. Statements of Impartiality Relayed by the Bailiff are Unsworn Hearsay Outweighed by Juror 11's Misconduct Demonstrating Bias.

Another example of the court's failure to resolve doubts regarding bias against the juror can be seen in the court's attempt to rehabilitate Juror 11's displayed bias. In order to refute the doubt of bias, the trial court seemed to rely on the bailiff's report that Juror 11 told her, "she is an adult, and she can put aside, and she feels she can be here. She just wanted us to know that it was on her mind." RP 2/28/2013, 8:25-9:3. However, the bailiff's report lacks reliability because it consists of unsworn hearsay that was not subjected to cross-examination and is of little, if any, evidentiary value. Consequently, resolving doubts of bias against Juror 11, the little evidentiary value the bailiff's report has is outweighed by Juror 11's reported misconduct demonstrating bias. In particular, the conduct that

demonstrates Juror 11's bias includes the reports that she had been openly making biased and prejudicial comments about Hannah Jones's case and her lawyers, CP 351-352, ¶ 2; CP 349-350, ¶ 4; and that she was attempting to engage and recruit other jurors to discuss the case before deliberations, CP 351-352, ¶ 2. Accordingly, the trial court's attempt to justify rehabilitation of Juror 11 demonstrates the court's misapplication of the proper legal standard for the resolution of doubts regarding juror bias.

Additionally, the trial court demonstrated it had doubts regarding Juror 11's bias. Specifically, when Hannah Jones's renewed her motion to excuse Juror 11, the trial court said, "She has been on my mind throughout the entire trial." RP 3/20/2013, 104:10-11. This doubt should have been resolved against permitting Juror 11 to serve. *Burton*, 948 F.2d at 1158.

The trial court's failure to apply the correct standard and resolve doubts regarding bias against Juror 11 was predicated on an erroneous interpretation of the law. Therefore, the trial court should be reversed because Hannah Jones is entitled to a new trial.

II. HANNAH JONES IS ENTITLED TO A NEW TRIAL BECAUSE OF JUROR 11'S CONCEALED JUROR BIAS.

The trial court's denial of Hannah Jones's Motion for a New Trial was a clear abuse of discretion because Juror 11 failed to disclose bias which would have warranted a challenge for cause based on actual,

presumed, and/or implied bias.

A juror's misrepresentation or failure to speak when called upon during voir dire regarding a material fact constitutes an irregularity affecting substantial rights of the parties. *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989). "The right to trial by jury includes the right to an unbiased and unprejudiced jury. A trial by a jury, one or more of whose members are biased or prejudiced, is not a constitutional trial." *Allison v. Department of Labor & Indus.*, 66 Wn.2d 263, 265, 401 P.2d 982 (1965). "Whether the juror's bias actually affected the verdict is irrelevant." *Dalton v. State*, 115 Wn. App. 703, 714, 63 P.3d 847 (2003). A juror's bias "could inject any number of positive or negative emotions from the juror, whether conscious or not, that may manifest in supportive or obstructive reactions." *State v. Boiko*, 138 Wn. App. 256, 264, 156 P.3d 934 (2007).¹ **"When the failure to respond in voir dire relates to a material question, the appropriate remedy is to grant a new trial."** *Robinson*, 113 Wn.2d at 159, 776 P.2d 676 (quoting *Gordon v. Deer Park Sch. Dist.* 414, 71 Wn.2d 119, 122 (1967)) (emphasis added).

³ The same standards for jury misconduct apply to civil and criminal cases. See *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir.1983) (stating that reliance on criminal cases is appropriate because the "integrity of the jury system is no less to be desired in civil cases." (quoting *United States v. Barfield*, 359 F.2d 120, 124 (5th Cir.1966))).

Typically, to obtain a new trial for juror bias for undisclosed information in voir dire, a party generally must show that (1) the juror failed to answer a material question and (2) a truthful disclosure would have provided a valid basis for a challenge for cause. *State v. Boiko*, 138 Wn. App. 256, 261-62, 156 P.3d 934 (2007) (citing *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (plurality opinion) and *State v. Cho*, 108 Wn. App. 317, 321, 30 P.3d 496 (2001)). “Bias, either actual or implied, is a recognized basis for a challenge for cause.” *Cho*, 108 Wn. App. at 324, 30 P.3d 496 (citing RCW 4.44.170(1) and (2)). See also RCW 4.44.180 and 4.44.190. Whether bias was overtly injected into the jury’s deliberations is irrelevant. *Dalton*, 115 Wn. App. at 715, 63 P.3d 847.

“The existence of concealed bias or prejudice in a juror is not a matter that inheres in a verdict.” *Dalton v. State*, 115 Wn. App. 703, 716, 63 P.3d 847 (2003) (citing *Smith v. Kent*, 11 Wn. App. 439, 444, 523 P.2d 446 (1974) and *Allison v. Dep’t of Labor & Indus.*, 66 Wn.2d 263, 265, 401 P.2d 982 (1965)). “Neither does juror misconduct in giving a false answer to a material question propounded to the prospective juror on voir dire examination inhere in the verdict.” *Dalton*, 115 Wn. App. at 716, 63 P.3d 847 (citing *Smith*, 11 Wn. App. at 445, 523 P.2d 446 and *Drury v. Franke*, 247 Ky. 758, 57 S.W.2d 969 (1933)). In the Washington cases

that have considered allegations that a juror failed to disclose bias against a party, affidavits containing hearsay statements of the juror in question were the means by which that bias was brought to the court's attention. *Dalton*, 115 Wn. App. at 716, 63 P.3d 847. *See, e.g., Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 156, 776 P.2d 676 (1989); *State v. Cho*, 108 Wn. App. 315, 329, 30 P.3d 496 (2001); *Allyn v. Boe*, 87 Wn. App. 722, 728, 943 P.2d 364 (1997). Hence, it would be err for a court to refuse to consider statements made in declarations filed in support of a motion for new trial merely because the statements were hearsay. *Dalton*, 115 Wn. App. at 716, 63 P.3d 847.

A. Juror 11's Actual Bias.

“Actual bias requires ‘the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.’” *Kuhn v. Schnall*, 155 Wn. App. 560, 574, 228 P.3d 828 (2010) (quoting RCW 4.44.179(2)). “In essence, ‘[a]ctual bias is ‘bias in fact’-the existence of a state of mind that leads to an inference that the person will not act with **entire** impartiality.’” *United States v. Gonzalez*, 214 F.3d 1109, 1111-12 (9th Cir. 2000) (quoting *United States v. Torres*, 128 F.3d 38, 43 (2nd Cir.1997)) (emphasis added). “Although ‘[b]ias can be

revealed by a juror's express admission of that fact, ... more frequently, jurors are reluctant to admit actual bias, and **the reality of their biased attitudes must be revealed by circumstantial evidence.**” *Gonzalez*, 214 F.3d at 1111-12 (quoting *United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977)) (emphasis added). As discussed above, “RCW 2.36.110 places a “continuous obligation” on the trial court to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating.” *State v. Elmore*, 155 Wn.2d 758, 773, 123 P.3d 72, 79 (2005) (quoting *State v. Jorden*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000)). “Doubts regarding bias must be resolved against the juror.” *State v. Cho*, 108 Wn. App. at 330, 30 P.3d 496. “The presence of a bias juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.” *Gonzalez*, 214 F.3d at 1111 (quoting *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998)); *Robinson*, 113 Wn.2d at 159, 776 P.2d 676.

In this case, Juror 11 demonstrated actual bias when she told other members of the jury that she was **"shocked it had not made a difference to the Court that Ms. Lauren was [her] neighbor,"** CP 488, ¶ 13, and that she **“should not be on this jury.”** CP 348-349, ¶ 2 (emphasis added). Therefore, the trial court abused its discretion in denying Hannah Jones a new trial.

B. Juror 11's Presumed Bias.

"[W]hen a prospective juror deliberately withholds information during voir dire in order to increase the likelihood of being seated on the jury, courts should draw a conclusive presumption of bias. *Cho*, 108 Wn. App. at 325, 30 P.3d 496 (quoting *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981), as holding "a district judge shall presume bias, and grant a new trial, when a juror deliberately concealed information or gave a purposefully incorrect answer."). This presumption of bias should not be changed by the juror's later protestations of impartiality, however sincere. *Cho*, 108 Wn. App. at 329, 30 P.3d 496.

As discussed above, Juror 11's declaration filed in support of Regency's opposition to a new trial is false and provides strong circumstantial evidence from which the court should have inferred that Juror 11's concealment of the fact she was Ms. Lauren's neighbor was, or at least could have been, intentional. Resolving doubts regarding bias against the juror, the court should have found that Juror 11 deliberately concealed information to increase the likelihood of being seated on the jury and drawn a conclusive presumption of bias. Therefore, the trial court erred in denying Hannah Jones a new trial.

C. Juror 11's Implied Bias.

“Implied bias requires ‘the existence of the facts [that] in the judgment of law disqualifies the juror.’” *Kuhn*, 155 Wn. App. at 574, 228 P.3d 828 (quoting RCW 4.44.170(1)). “One way in which a prospective juror can be impliedly biased is if he or she has ‘an interest . . . in the event of the action, or the principal question involved therein.’” *Id.* (quoting RCW 4.44.180(4)). “Because a great variety of fact patterns can arise, a trial court must have a measure of discretion in determining what constitutes an ‘interest’” *Id.* (quoting *Carle v. McChord Credit Union*, 65 Wn. App. 93, 109, 827 P.2d 1070 (1992)). “Doubts regarding bias must be resolved against the juror.” *State v. Cho*, 108 Wn. App. at 330, 30 P.3d 496.

“In *McDonough*, a majority provided for a finding of implied bias without a showing of intentional concealment.” *Boiko*, 138 Wn. App. at 261-62, 156 P.3d 934 (citing *McDonough*, 464 U.S. at 556–57, 104 S. Ct. 845 (Blackmun, J., concurring); *id.* at 558, 104 S. Ct. 845 (Brennan, J., concurring)). “Instead of establishing intentional concealment, “[w]here a juror’s responses on voir dire do not demonstrate actual bias, in exceptional cases the courts will draw a conclusive presumption of implied bias from the juror’s factual circumstances.”” *Boiko*, 138 Wn. App. 256, 261-62, 156 P.3d 934 (quoting *Cho*, 108 Wn. App. at 325). A

finding of implied bias does not require a showing of intentional concealment. *Boiko*, 138 Wn. App. at 261-62, 156 P.3d 934. “[T]he issue for implied bias is whether *an average person in the position of the juror in controversy* would be prejudiced.” *Gonzalez*, 214 F.3d at 1112-13 (quoting *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1260-61 (10th Cir.1999)) (emphasis in original). “[P]rejudice is to be presumed ‘where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances.’” *Gonzalez*, 214 F.3d at 1112-13 (quoting *Tinsley v. Borg*, 895 F.2d 520, 527 (9th Cir.1990)). “[T]he relevant question ‘is whether ‘[the] case present[s] a relationship in which the potential for substantial emotional involvement, adversely affecting impartiality, is inherent.’” *Gonzalez*, 214 F.3d at 1112-13 (quoting *United States v. Plache*, 913 F.2d 1375, 1378 (9th Cir.1990)). “Because the implied bias standard is essentially an objective one, a court will, where the objective facts require a determination of such bias, hold that a juror must be recused even where the juror affirmatively asserts (or even believes) that he or she can and will be impartial.” *Gonzalez*, 214 F.3d at 1112-13 (citing *Dyer*, 151 F.3d at 982 (“Even if the putative juror swears up and down that it will not affect his judgment, we presume conclusively that he will not leave [it] ... at the jury room door.”)). “The

presence of a bias juror cannot be harmless; the error requires a new trial without a showing of actual prejudice.” *Gonzalez*, 214 F.3d at 1111 (quoting *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998)); *Robinson*, 113 Wn.2d at 159, 776 P.2d 676.

In this case, Juror 11’s close residential proximity to Ms. Lauren for the last five years and their relationship as neighbors represent the kind of influence that would prejudice an average person, especially given the potential of seeing Ms. Lauren and her family on a routine and continual basis in the neighborhood combined with: (1) concern that a verdict against Ms. Lauren’s client would create animosity, adversity, and uncomfortable friction with a neighbor whose property line is only 115 feet away; (2) the reciprocally-enforceable Protective Covenants of the Canterbury Woods subdivision that exist to preserve and promote their mutual economic and property interests; (3) the right to file suit to enforce any violation or threat of violation of the Protective Covenants, which would have encouraged their mutual respect as neighbors and increased their desire to get along; (4) the natural tendency to be empathetic towards and side with a neighbor; and (5) the inherent need to maintain and further a positive relationship with a neighbor. CP 293-339; CP 354-357. Further, Juror 11’s conduct, especially after the jury was dismissed, clearly demonstrates the nature and extent of her relationship with defense

counsel was significant enough to prevent her from being a fair and impartial juror. CP 343-347. Moreover, it is self-evident that Juror 11 recognized her own bias because she confided in other jurors that she “**should not be on this jury**” and voluntarily disclosed her relationship with Ms. Lauren to the Court. CP 348-349, ¶ 2; CP 488, ¶13 (emphasis added).

The nature of Juror 11’s relationship with defense counsel in this case “could [have] inject[ed] any number of positive or negative emotions from the juror, whether conscious or not, that may [have] manifest[ed] in supportive or obstructive reactions.” *See Boiko*, 138 Wn. App. at 264, 156 P.3d 934. Likewise, Juror 11’s comments reported by Juror 10, CP 351-353, and her “presence may have had an affect on other jurors by inhibiting the frank discussion necessary to render an impartial verdict.” *See Boiko*, 138 Wn. App. at 264, 156 P.3d 934.

Consequently, the nature and extent of the relationship between Juror 11 and Ms. Lauren demonstrates actual and thus implied bias by presenting more than the required **inference** that Juror 11 could not act with **entire** impartiality. *See Gonzalez*, 214 F.3d at 1111-12 (emphasis added). Additionally, the nature and extent of their relationship and the need to avoid antagonism, given their intertwined economic and legal interests and proximal location, CP 293-339, creates an interest on Juror

11's part in the outcome of the case, which amounts to implied bias. *See* RCW 4.44.180(4). Had Juror 11 disclosed her relationship with Ms. Lauren on voir dire, a strike for cause would have been warranted.¹ Therefore, because Juror 11 failed to disclose a material fact on voir dire that would have provided a valid basis to excuse her for actual and/or implied bias, "the appropriate remedy is to grant a new trial." *Robinson*, 113 Wn.2d at 159, 776 P.2d 676.

III. HANNAH JONES IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY ENGAGED IN MISCONDUCT THAT DENIED HER A FAIR TRIAL.

"The policy favoring stable and certain verdicts and the necessity of maintaining the secrecy of deliberation and frank and free discussion by all jurors must yield (1) if the affidavit(s) of the jurors allege Facts showing Misconduct, and (2) those facts are sufficient to justify . . . a determination that the misconduct affected the verdict." *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973). The verdict is affected if there is "sufficient misconduct to establish a **reasonable doubt** that the plaintiff was denied a fair trial." *Turner v. Stime*, 153 Wn. App. 581, 593, 222 P.3d 1243 (2009) (citing *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d

⁴ Such a strike would have been based upon the current and ongoing relationship between Juror 11 and Ms. Lauren, in contrast to the peremptory challenge Plaintiff exercised to remove a venire member who had a past relationship with Pam Andrew's husband.

651 (1962)) (emphasis added). Doubts regarding the affect of the misconduct on the verdict “**must** be resolved in favor of granting a new trial.” *Halverson*, 82 Wn.2d at 750, 513 P.2d 827 (emphasis added).

In this case, as demonstrated by the facts recited above, Juror 11 and other jurors began discussing the case and the lawyers before deliberations, despite the court’s instruction to the contrary. CP 351-352, ¶ 2; CP 349-350, ¶ 4. Their open discussions became quite prejudicial and biased against the Ms. Jones and her counsel—so much that Juror 10 warned the Bailiff that the jury was “on the verge of a mistrial.” CP 351-352, ¶ 2. Consistent with Juror 11's undisclosed actual and/or implied bias, the jury comments referred to Ms. Jones's counsel as “rich lawyers” and “a suing machine” before and during deliberations. Such, derogatory comments about lawyers are imputed to the client because the close association presented by the nature of the attorney-client relationship. *Turner*, 153 Wn. App. at 594, 222 P.3d 1243. Referring to Ms. Jones's counsel as “rich lawyers” and “a suing machine” insinuates that Ms. Jones is greedy and that her suit is an attempt to *win the lottery*—a sentiment emphasized in Regency's closing argument. RP 3/20/2013, 95:9-17. As observed in *Dalton v. State*, comments depicting Plaintiff as an “opportunist trying to profit” from her mother’s injuries exhibits an actual bias against the plaintiff and her case. 115 Wn. App. at 854, 63 P.3d 847.

Further, Juror 11’s attempts to engage and recruit other jurors to violate the Court’s instructions infected the jury with bias and prejudice. Moreover, as discussed above, even after the jury misconduct was reported, the court failed to admonish the jury or take any corrective action, thus amplifying the affect of the misconduct on the verdict by permitting and inference that the court agreed with and approved of the misconduct. The facts establishing misconduct in this case are more than sufficient to establish “**a reasonable doubt** that the plaintiff was denied a fair trial.” *Turner*, 153 Wn. App. at 593, 222 P.3d 1243 (emphasis added). Therefore, the trial court erred in failing to grant Hannah Jones a new trial.

Conclusion

Hannah Jones was denied a fair trial because the court erroneously interpreted the law pertaining to: (1) its lawful duty to investigate and dismiss unfit jurors, and (2) the correct legal standard for the resolution of doubts regarding juror bias. Additionally, the trial court clearly abused its discretion in failing to grant Hannah Jones a new trial because of Juror

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11's concealed bias and jury misconduct. Therefore, Hannah Jones is entitled to a new trial.

DATED this 27th day of January, 2014.

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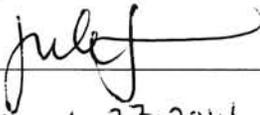
DECLARATION OF SERVICE

Jule Sprenger declares, under penalty of perjury under the laws of the State of Washington, that the following is true:

1. I am employed by Skellenger Bender, P.S., counsel of record for Appellant Hannah Jones in this action; a resident of the State of Washington; over the age of 18 years; and not a party to this action.

2. On the January 27, 2014, I arranged for the filing of one original and one copy of the Brief of Appellant and this Declaration of Service with the Clerk of the Court of Appeals, Division One, and served Respondent as indicated below:

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